Testimony to Judicial Council Conservatorship Task Force: How to Increase Court Oversight and Accountability in Permanent Conservatorships

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Members of the Judicial Council Conservatorship Task Force:

Thank you for inviting me to speak to you this afternoon. I practice elder law, incapacity planning, estate planning, and conservatorship law in the Bay Area, and most particularly in Santa Clara and San Mateo counties. I have worked in the Conservatorship field for twenty years. I represent conservators, including some private professional conservators, and conservatees, as well as members of the families of conservatees who are objecting to conservatorships or to particular steps taken by conservators. I have served myself on one or two occasions as a conservator. And I have been able to persuade courts in my county to turn over a number of conservatorships from private professionals or the public guardian to family members.

Although the Los Angeles Times series of articles that has served as the stimulus for these hearings has focused on so much that has gone wrong in particular conservatorships, I, and many of my colleagues believe that there is a lot that is right about our existing legislation, and that those courts that have vigorous staffs in adequate numbers can enforce the law properly and make the existing legislation work. The Trusts and Estates section of the State Bar has recommended particular positions and amendments to the bills presently under consideration in Sacramento, which I will address in detail in a few minutes. Our focus is to provide greater protections in a few areas where we believe the system should be improved, and to urge the Legislature and the Governor to take seriously the problem of staffing and funding, which in our opinion is the real problem in court oversight and accountability.

Let's take the hypothetical case of a conservator who absconds with a conservatee's assets. Our existing law (Probate Code Section 2320) requires that conservator to be bonded for the value of personal property, estimated annual income, and estimated public benefits payments. A fiduciary who is underbonded has a mandatory duty to seek an increase in the bond (Probate Code Section 2320.1). If the value in the estate is in real property, the real property itself is not subject to bond, but when real property is sold, the court order confirming that sale is not effective until a higher bond is filed with the court. Probate Code Section 2330. These provisions are in the law already. When I read about absconding conservators or houses improperly sold, where the proceeds are lost to the conservatorship estate, my thought is not that the law is wrong but that the enforcement of the law is deficient. Why wasn't there a surcharge action? Wasn't the bond adequate to repay the estate? Why wasn't the fiduciary brought into court for an action for breach of fiduciary duty? Why wasn't the problem picked up at the time of the accounting? Didn't anyone call the court, or the court investigator, or a private attorney, to complain about the abuse? What is required?

According to the court officials quoted in the Los Angeles. Times series, there were too many cases, not enough investigators, not enough staff members available to review the cases, accountings that had gone unscreened for years, and essentially a complete failure of the system. What we need is more staff, more funding, and more compliance with existing laws.

Do the courts provide adequate oversight where conservatees and their family members seek help from the court system? Once a Conservatorship is created, the conservatee benefits from the protections of the system but also loses certain rights. The conservator is mandated to seek the least restrictive setting for the conservatee, but the conservatee can no longer find his or her own place to live, pay his or her own bills, transfer property, serve as his or her own trustee, or do many of the things we take for granted. (Keep in mind that our law is flexible enough to provide exceptions for nearly all of these restrictions.) How does a conservatee appeal to the court for help? Are the courts responsive to such pleas? Can the conservatee's family members find a willing ear to listen to complaints? I benefit from working in counties where the Court investigation office and the court attorney are proactive; when a complaint does come in, depending upon its seriousness, they can start the mechanism to have the court appoint counsel for the conservatee or to notify the APS unit in the county, but it's clear from the volume of complaints about this issue that there might be room for changes..

Senator Bowen's bill, SB 1716, seeks to address this problem by permitting ex parte communications concerning conservators and conservatees and by mandating more frequent review by court investigators. . The Trusts and Estates section is seeking amendment of that bill, to permit the ex parte communication to be acted upon, but at the same time to ensure due process and to guarantee that all parties and counsel will receive notice of the communication. The Senator's bill also would permit the court to order an investigation of a Conservatorship on any occasion deemed appropriate by the court. We support this part of the bill. The Section is proposing that the bill be amended, however, to delete its suggested change in the timing of court investigation reviews. The bill as proposed would require the court investigator to complete an investigation within the first year of the Conservatorship, which would be before the first account and report has been filed with the court. In an informal poll conducted by the Trusts and Estates Section last week, we found that the court investigation offices polled concluded unanimously that such a mandate would require an increase of ten to twenty percent in funding for new positions to undertake the duplicative investigations that would be necessary. The Section also supports the part of the Senator's bill that explicitly mandates the court investigator to report on the appropriateness of the conservatee's placement, the conservatee's quality of care, including physical and mental treatment, and the conservatee's financial condition, all of which, in our opinion, are subjects touched upon in some detail by most court investigation reports we normally see.

Another area of frequent complaint has to do with moving a conservatee from his or her home. The existing law (Probate Code Section 2352) requires a conservator to place a conservatee in the least restrictive residence available and suitable for the conservatee's needs. The Trusts and Estates Section supports Senator Scott's Bill, SB 1116, if it is amended to include provisions that would create a presumption that the conservatee's personal residence is the least restrictive residence, would create a fiduciary duty to evaluate residential and care needs focused on keeping the conservatee at home whenever possible, would require all notices of change of residence to state that the change of residence is consistent with the "least restrictive residence" standard, would require mailing all changes of residence to second degree family members, and would create a series of enhanced safeguards regarding the sale of a conservatee's personal residence.

Many of the Conservatorship problems described in the Los Angeles Times articles raised issues that should have been caught at the investigation stage during routine accountings at the end of the first year and every two years thereafter. The Trusts and Estates Section was involved five years ago in the legislative changes regarding accountings introduced in response to the Bonnie Cambalik matter. Probate Code Section 2620.2 was amended to provide a series of alternative remedies the court can implement when a conservator fails to file an accounting in a timely manner. Section 2620 was amended to provide a requirement to file original statements for all accounts. We believe these procedures can be effective if the court adequately enforces them. The best way to increase court oversight and accountability regarding Conservatorship assets and the financial transactions performed by a conservator is to enforce the existing law.

The Section also has taken positions supporting many of the licensing and certification provisions for professional fiduciaries of both AB 1363 (Jones) and SB 1550 (Figueroa), although we find that each bill's licensing provisions should be amended to provide for more due process in the area of sanctions and suspension. We recognize that a licensing system alone is no substitute for vigorous and well funded court reviews by the court investigation units, for thorough review of court accountings by the investigators and the probate examiners, and for oversight by the courts throughout the Conservatorship process. These steps do not require new laws; rather they require increased staff and funding. For these reasons, the Section has expressed reservations about many of the changes proposed in AB 1363, especially those that call for increased frequency of accountings. While it might be worthwhile to consider requirement of a greater number of statements for each account (rather than only the initial statement and the closing statement for each account period), the legislature should move cautiously where a change in the law would create a paper deluge in the offices of the court investigators and probate examiners.

A more positive step, which would affect legislation governing both permanent and temporary conservatorships, would be to keep family members of conservatees, and the conservatees themselves, informed about the process. Some of the notice provisions of the law should be expanded to disseminate more information about the Conservatorship to the conservatee and family members, including the confidential supplemental information form, the inventory and appraisal, and the accountings. The Trusts and Estates Section has recommended support for provisions of AB 1363, presently in the Senate, that would enhance notice to conservatees and family members of a number of procedures in conservatorships.

There is one area having to do not so much with increased accountability by the court but with rational and efficient modernization of the Conservatorship process that is not presently before the Legislature but should be: a revamping of the archaic investment standards of Probate Code Sections 2570 to 2574. The State Bar has endorsed the Section's legislative proposal for such reform, which would bring current investment standards in line with prudent investor standards of the trust act and permit modern techniques of risk mitigation to be used in the Conservatorship forum without costly petitions to the court. Such reform would streamline Conservatorship investment standards, cut down on the costs of conventional patterns of investment, and require conservators who wish to make "nonstandard" investments to petition the court for prior authorization of their acts.

In closing I'm reminded of the great medieval philosopher Moses Maimonides's analysis of charity: the highest form of charity, he held, was to reform society so that charity was unnecessary. In the context of our forum today, I would posit that the most constructive act the courts and the Legislature could entertain would be to work toward making Conservatorships unnecessary. Along these lines, for several years the Trusts and Estates Section has sought revision of our Business and Professions Code to permit attorneys whose incapacitated clients are

at risk of personal or fiduciary abuse but are so lacking in capacity that they can no longer seek to protect themselves or understand their risk to seek help for those clients. We hope that the State Bar's Rules Revisions Commission, and the Board of Governors, will support the initiatives of our Section to seek change both in the Rules of Professional Conduct and the Business and Professions Code Section 6068(e), which would at last permit attorneys to take the vital first step that might keep their clients away from the need of a Conservatorship by reaching out to a doctor, a family member, a friend or neighbor to help a senior. Our first goal should be not just to enhance the accountability of the conservatorship system but to keep people out of the costly and invasive Conservatorship system in the first place.

Peter S. Stern is an attorney practicing privately in Palo Alto, California. His practice emphasizes estate planning, probate, and elder law. He received his legal education at Stanford Law School, where he was a member of the class of 1981. He is a past chair of the executive committee of the Estate Planning, Probate, and Trust Section of the Santa Clara County Bar Association (1993) and a member of the Board of Trustees of the Bar Association (1992-94). He is certified as a specialist in Estate Planning, Trust and Probate Law by the California Board of Legal Specialization of the State Bar of California. He is a member of the Executive Committee of the Trusts and Estates Section of the State Bar of California and of the Silicon Valley Bar Association. He serves on the Probate and Mental Health Committee of the Judicial Council of California.

Mr. Stern holds undergraduate and graduate degrees in history from Denison University and Princeton University. Prior to his work in law, he served as a member of the history departments at Stanford University and the University of Santa Clara, where he specialized in modern and contemporary France. He has also served in the U.S. Department of State.

His present practice deals with a broad spectrum of estate planning, conservatorships, probate, and elder law, including Medi-Cal planning and other legal assistance of families of persons suffering from incapacities. He has lectured on elder law, Medi-Cal planning, and special needs trusts for Continuing Education at the Bar, the Santa Clara County Bar Association, the National Business Institute, and California Advocates for Nursing Home Reform.